IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

FRIDAY, THE 3RD AUGUST 2007 / 12TH SRAVANA 1929

CRL.A.No. 1829 of 2003()

SC.528/2000 of ADDL.SESSIONS COURT (ADHOC-I), KASARAGOD
.....

APPELLANT: ACCUSED

MALINKA NAIK, S/O. KUNHA NAIK,
AGED 33 YEARS, EVINJA, KOLLANKANAM,
BELA VILLAGE.

BY ADV. SRI.P.V.JAYARAJAN
SRI.SREEJITH S.NAIR

RESPONDENTS: COMPLAINANT

STATE-REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY P.P.SRI. PUZHAKKARA MUHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 03/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. THANKAPPAN, J.

CRL.A.NO.1829 OF 2003

Dated this the 3rd day of August, 2007.

JUDGMENT

The sole accused in S.C.528/2000 on the file of the Additional Sessions Judge(Adhoc-I), Kasaragod, is the appellant. The appellant was charge sheeted by the Sub Inspector of Police Badiaduka for an offence punishable under Section 55(g) of the Abkari Act. The prosecution case against the appellant is that PW4- the Sub Inspector and PW2 – the Police Constable conducted a search in the house of the appellant on 6.7.1999 at about 3.45 a.m and also searched in the nearby property alleged to have been possessed by the appellant and found that 100 liters of wash was kept in four cannas each contained 25 liters capacity at about 7 meters away from building No. BPW VIII/589 at Evinja in Bela village and thus the appellant committed the said offence. To prove the case against the appellant 4 witnesses were examined and Exts.P1 to P6 were produced. After the trial, the appellant was questioned under Section 313 of the Code. He denied the prosecution allegation and had stated that he was actually arrested from his house and he is not in possession of the building or the property from the contraband article alleged to

have been seized by PW4. On the side of the defence, D1 and D2 were also produced to prove that the appellant was not the owner of the house and he was residing away from the house. However, the trial court after considering the entire evidence found the appellant guilty under Section 55(g) of the Abkari Act and he was convicted thereunder and sentenced to undergo R.I for three and a half years and to pay a fine of Rs.One lakh with default of sentence of payment of fine, to undergo R.I for a further period of three months. That judgment is challenged in this appeal.

2. This Court heard the learned counsel appearing for the appellant as well as the Public Prosecutor and also perused the records made available to this Court. The trial court mainly relied on the evidence of Pws 2 and 4 out of whom PW4 was the Sub Inspector, who conducted the search and seized the contraband article and had taken the sample for analysis. The trial court also relied on the mahazar prepared by PW4 and also the chemical report- Ext.P6 to find the appellant guilty.

3. The learned counsel appearing for the appellant contends that the evidence of Pws 2 and 4 are not sufficient to prove that the

appellant was found in possession of 100 liters of wash as alleged by the prosecution since there was no independent witness examined by the prosecution to prove the case against the appellant. Further contention of the counsel for the appellant is that PW4 had not followed the procedure prescribed under the provisions of the Abkari Act and the Kerala Excise Manuel while conducting search of the house and also seizure of the contraband from the alleged possession of the appellant as he had not called any independent witness to witness the seizure of the contraband article and one witness examined as PW3 had stated that he was not present in the scene of occurrence and he had not seen anything seized from the property of the appellant. Further contention of the learned counsel for the appellant is that the prosecution had not proved that as per Ext.P6 mahazer that the contraband seized or the sample taken by PW4 has been produced before the court without any unnecessary delay so as to rule out the chance of substitution of the contraband or the sample. It is seen that contents of Ext.P6 has not been put to the appellant by the court when he was questioned under Section 313. The evidence given by Pws 2 and 4 would not show that PW4 had seized the contraband as per the provisions of the Act as there was no evidence that he had put his seal or label on the

sample and the contraband seized in the presence of any independent witness. Considering the contention of the learned counsel, this Court has to see whether the finding of the trial court is justifiable or not. Admittedly, the evidence of Pws 2 and 4 would show that the alleged seizure was on search of the house of the appellant at about 3.30 a.m and that too without having given any search memo to the appellant or to send a copy of the search memo to the court before conducting search in the house of the appellant. Apart from the above infirmity, it is admitted before this Court that at the time of preparation of Ext.P2 seizure mahazer no independent witness was called to witness the action taken by PW4. Hence, the contention of the counsel that PW4 had violated the provisions of Kerala Excise Manuel as well as the provisions of the Abkari Act is justifiable as the prosecution has not proved that PW4 had complied with the relevant provisions regarding that. On that score itself, the action taken by PW4 is not justifiable and could not prove that the sample and the contraband were seized from the possession of the appellant as alleged by the prosecution. Apart from the infirmity of the evidence of Pws 2 and 4, there is no proof before the court that the house which was searched by PW4 belongs to the appellant. In this context, PW1- the Village Officer had only

stated that an extent of .60 acres of land belongs to the appellant but there was no evidence to show that any house or building was situated in the property prescribed in the certificate. Further it has to be noted that as per Ext.P2 seizure mahazer PW4 and his police party found that 4 cannas were kept in mud about seven feets away from the house were the appellant was slept on the day of the incident. It is an open place and it is not possible to hold that the appellant was residing in that shed or building from where he was alleged to have been arrested by PW4. Further PW4 himself has admitted before the court that at the time of preparation of the mahazer no independent witness was either present or called. If so, the seizure mahazer cannot be considered as it is prepared by PW4 to prove his action of seizure of the contraband. No material object was also produced before the court to prove the case against the appellant. Even the exhibits produced before the court would show that no materials were produced before the court for enabling the court to find out the truth. It is also interesting to note that when the appellant was questioned under Section 313 of the Code, the contents of alleged chemical report was not put to him. If so, it is infraction of the right of the accused to know the contents of Ext.P6.

In the above circumstances and on the discussions made in this judgment and also on the findings entered by this Court, the judgment of the trial court is not justifiable in law. Accordingly, the judgment of the trial court is set aside and the appeal is allowed. The appellant is found not guilty of any of the charges. Accordingly, the judgment of the trial court is set aside. The appellant is acquitted. His bail bonds stand canceled. It is also directed that if any amount has been paid by the appellant, that amount shall be refunded to him as per law.

K. THANKAPPAN, JUDGE.

cl